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Docket No. 95-1489

In The
Supreme Court of the United States
1995 October Term

MARK DEAN GODDARD,
Petitioner,

v.

KANSAS DIRECTOR OF TAXATION ON ASSESSMENT OF MARIJUANA AND CONTROLLED SUBSTANCES TAX,
Respondent.

ON PETITION FOR CERTIORARI TO THE KANSAS SUPREME COURT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI BY RESPONDENT KANSAS DEPARTMENT OF REVENUE

Richard E. Oxandale,
General Counsel
Kansas Department of Revenue

Joseph Brian Cox, Attorney
Kansas Department of Revenue
Legal Services Bureau
Docking State Office Building
Topeka, Kansas 66612-1588
(913) 296-2381
Counsel of Record for Respondent Kansas Department of Revenue

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SUPPLEMENTAL NATURE OF THE CASE

This civil, administrative tax case involves the petitioner's [1] constitutional attack on a Kansas statute requir-

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[1] Some of the quotations in the body of this brief refer to multiple petitioners. Only the present petitioner remains in the case at this point.

ing the posting of an appeal bond before the Kansas appellate courts will review an administrative determination upholding the assessment of drug tax. The petitioner's initial Petition for Certiorari was returned to petitioner's attorney due to various printing and other errors. The petitioner has now filed an amended Petition for Certiorari, and the case has been docketed.

In his amended Petition for Certiorari, the petitioner provides a correct "Statement of the Case" as far as it goes. Because it is not complete, however, respondent Kansas Department of Revenue adds the following: The petitioner's April 7, 1995, "Motion for Waiver of Bond" filed in the Kansas Court of Appeals stated that "it is impossible for the taxpayers to pay in excess of $1.4 million dollars as a bond in order to appeal the findings of the Board of Tax Appeals." Respondent's Appendix at 1. The petitioner went on to allege in that motion that "denying the taxpayers the right to appeal the constitutionality of the statute merely because of the inability of the taxpayers to post the bond would be prejudicial, constitute irreversible harm, and is a perfect example of a true miscarriage of justice." *Id.* at 2. Petitioner suggested that the Court accept as sufficient bond approximately $10,000 already seized from him. *Id.* The Kansas Court of Appeals initially denied that motion "on present showing." Petitioner's amended Appendix at A-5 (Kansas Court of Appeals' "Order" of May 5, 1995). That order also, however, permitted both parties to "address the issue of an appropriate bond by written responses." *Id.*

Petitioner responded that "[g]iven appellants' occupations, they are unable to pay in excess of $1.4 million dollars as a bond in order to appeal the findings of the Board of Tax Appeals," and that "[r]equiring appellants to pay over a million dollars in order for an opportunity to prove their inno-

cence would deprive these taxpayers of the due process of law to which they are entitled under both the Kansas and the United States Constitutions." Respondent's Appendix at A-7, 8 ("Suggestions in Support of Appellants' Motion to Waive Bond"). He then suggested that the Court accept as sufficient bond the approximately $10,000 already seized from them, or that the Court waive the bond entirely. *Id.* at A-8 ("Suggestions in Support of Appellants' Motion to Waive Bond"). The Court of Appeals denied the motion, stating "Motion to waive bond denied. Appellant's [sic] have 10 days to file the required bond." Petitioner's amended Appendix at A-4 (Court of Appeals' order of June 26, 1995). No bond was ever filed.

The Court of Appeals then issued its "Order" of July 24, 1995, stating that "In the absence of a response to this court's order dated June 26, 1995, the appeal is hereby dismissed for appellants' failure to timely file a bond. See Kansas Supreme Court Rule 9.03(b)." *Id.* at A-3. The petitioner then filed his "Appellant's [sic] Motion for Rehearing and Modification" alleging again that he was "financially unable to post the required bond," Respondent's Appendix at A-14, and that "should the Court dismiss the instant appeal, Appellants will be denied the due process of law to which they are entitled under both the Kansas and the United States Constitutions as the only way they may seek judicial review of the subject tax assessment is by appeal to this Court," *id.* ("Appellants' Motion for Rehearing and Modification"). He also offered an additional $5,000 in bond. *Id.* at A-14, 15. The Court of Appeals denied the motion for rehearing without elaboration by its order of August 14, 1995. Petitioner's amended Appendix at A-2.

The petitioner then filed a petition for discretionary review with the Kansas Supreme Court in which he made the

same allegations as above, adding that "They are being denied due process and equal protection of the law as guaranteed by the Kansas Constitution and the U.S. Constitution." Respondent's Appendix at A-29. He then suggested that the approximately $10,000 previously seized serve as a bond, or that $5,000 be considered a sufficient bond. *Id.* at A-30. The Kansas Supreme Court denied the petition for review without elaboration by its order of September 26, 1995. Amended Appendix at A-1.

At no time in the Courts below did the petitioner offer legal authority, case law or secondary authority, in support of his claim, not did he suggest to those Courts the need for any briefing on the constitutional issue presented by him here, *i.e.* the constitutionality of Kansas' appeal bond statute.

ARGUMENT

I. THE PETITIONER'S ARGUMENT

The sole argument petitioner makes in his Petition for Certiorari is that "It is a denial of due process and of equal protection of the laws to require the taxpayers [sic] to post a bond in the amount of 125% of the tax assessed when they [sic] are challenging the constitutionality of the statute which assesses the tax and at the same time, the statute they are challenging presumes the tax to be accurate and places the burden of proof upon the tax payers [sic] to show the tax inaccurate." Petition for Certiorari at 5. The petitioner offers the Court no legal authority, case law or secondary authority, in support of his claim. Significantly, the petitioner makes no argument in his Petition that the assessment of the tax violates the Double Jeopardy Clause, and such issue was not addressed in this case at anytime by the Kansas courts below. As such, there is nothing for respondent to address concerning any such claim. Nor does the petitioner allege indigency.

II. PETITIONER OFFERS NONE OF THE REASONS FOR THE GRANT OF CERTIORARI CONTAINED IN SUP. CT. R. 10.1

Petitioner's one (1) paragraph argument on the issue as presented offers this Court none of the reasons for granting a petition for certiorari detailed in this Court's Rule 10.1, specifically (b) and (c). Although respondent recognizes that the Court is expressly not bound by the factors detailed in that Rule, the petitioner has also not offered the Court any *other* reasons for granting his petition for certiorari. Nor does he offer the Court citation to case law or secondary authorities supporting his constitutional claim. The most that petitioner has offered the Court is the bald conclusion that Kansas' tax appeal bond statute is unconstitutional. This is not "[a] direct and concise argument amplifying the reasons relied on for allowance of the writ" required by this Court's Rule 14.1(h).

III. PETITIONER DID NOT ADEQUATELY FRAME THE ISSUE IN THE STATE COURTS BELOW

Further, petitioner did not adequately frame in the Kansas courts below the constitutional issue now argued by him. This Court has held that it will generally not decide federal claims not "pressed or passed upon" below. *E.g., Clark v. Jeter*, 486 U.S. 456, 459-60 (1988)(relying on *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 79-80 [1988]). Similarly, this Court's Rule 14.1(g)(i) requires that the petitioner must detail "when the federal questions sought to be reviewed were raised; the method or manner of raising them and the way in which they were passed on by those courts . . . ."

In an apparent attempt to comply with these requirements, petitioner alleges that "The due process and equal

protection constitutional questions were raised at every step of the appellate process from the initial appeal within the State of Kansas Department of Revenue through the petition to the Supreme Court of the State of Kansas. The issues were raised in writing in the briefs to each of the entities upon the question." Petition at 4.

This statement is not only incomplete but inaccurate. For example, the petitioner failed to include in his appendix any record of the arguments presented by him on this issue to the Kansas Supreme Court. Further, the petitioner apparently confuses the statutory appeal bond issue pressed by him in this Court with the Double Jeopardy issue pressed by him below but not in this Court. Clearly, the appeal bond issue is raised in a conclusory fashion here, just as it was raised in a somewhat more conclusory fashion in the Kansas courts below; such issue was not, however, raised administratively, as petitioner alleges, because the appeal bond issue simply did not present itself until petitioner appealed to the Kansas Court of Appeals. Further, it does not appear that the petitioner raised his Equal Protection argument until he sought discretionary review in the Kansas Supreme Court. Just as clearly, the petitioner did raise the Double Jeopardy issue administratively, but clearly did not in the Kansas courts below, and certainly does not here. Nor has the petitioner provided to this Court any evidence of "the way in which [the issue] w[as] passed on by those courts . . . .]," Rule 14.1(g)(i), above. As such, respondent respectfully submits that the petitioner has not brought up a record for this Court affirmatively establishing that he pressed the issue below and that it was in fact passed on by the Kansas courts.

IV. THE ORDERS BY THE KANSAS COURT OF APPEALS AND SUPREME COURT DID NOT DECIDE ANY IMPORTANT QUESTION OF FEDERAL LAW

A. PETITIONER NEITHER SOUGHT NOR RECEIVED ANY RULING BELOW ON THE CONSTITUTIONAL ISSUE

As noted above, the constitutionality of Kansas' statutory appeal bond was never addressed by the Kansas appellate courts. The fault for this omission rests squarely with petitioner who, for all his appellate submissions in the Kansas courts reveal, made virtually no effort to secure a ruling on the issue before moving on to the next level. Certainly, none of the potential underlying legal issues present concerning the penultimate issue of the constitutionality of Kansas' statutory appeal bond, some of which are discussed § V, below, was presented by the petitioner to the Kansas appellate courts. As noted above, the petitioner offered those courts no legal authority, case law or secondary authority, in support of his claim, nor did he suggest to those courts the need for any briefing on the constitutional issue presented by him in the case. As a result, it is not surprising that the Kansas appellate courts did not address the issue.

B. THE FACTUAL RECORD IS NOT FULLY DEVELOPED

Nor is the factual record which might be relevant to the petitioner's constitutional argument fully developed in this case. For example, how much appeal bond would have been acceptable in this case? What types of appeal bonds have the Kansas appellate courts required in the past in tax cases pursuant to K.S.A. 74-2426(d), (e), and Kan. Sup. Ct. R. 9.03(b)?

Further, how does such history compare with the appeal bond required in general civil litigation, K.S.A. 60-2103(d)? In addition, what other efforts have been made by the petitioner to secure a ruling on his Double Jeopardy issue in other forums (discussed § V[A], below)? These and numerous other fact matters relevant to the legal issue remain shrouded in the shadow of the spare record which exists in this case. Petitioner bears sole responsibility for this state of the record.

C. NO CLAIM IS MADE THAT THIS CASE WILL AFFECT ANYONE OTHER THAN PETITIONER

Certainly important for this Court's grant or denial of his petition for certiorari is that petitioner makes no claim that resolution of the issue presented will affect anyone other than him. The factual record explains why. In his Petition, the petitioner fails to note that the Kansas Court of Appeals initially denied his motion to waive the statutory appeal bond "on present showing." Petitioner's amended Appendix at A-5 (Kansas Court of Appeals' "Order" of May 5, 1995). That order also, however, permitted both parties to "address the issue of an appropriate bond by written responses." *Id.* Petitioner took an all-or-nothing attitude: he suggested that the Court accept as sufficient bond approximately $10,000 already seized from him, or that the Court waive the bond entirely. Respondent's Appendix at A-8 ("Suggestions in Support of Appellants' Motion to Waive Bond"); A-2 ("Motion for Waiver of Bond"). He also failed to offer the Court some reasonable, middle ground. It was not until after the Court ruled against him that he offered an additional $5,000 in bond. Respondent's Appendix at A-14 ("Appellants' Motion for Rehearing and Modification").

As evidenced by its order just referred to, the Kansas Court of Appeals is of the opinion that, in an appropriate case,

and upon a sufficient showing, a reduction in appeal bond will be permitted. Such is Kansas law. K.S.A. 74-2426(d), (e); Kan. Sup. Ct. R. 9.03(b). As such, this case is not a case of an alleged unconstitutional enforcement of a 125% appeal bond. Rather, this case involves simply the petitioner's failure to convince either the Kansas Court of Appeals or the Kansas Supreme Court (in his application to that Court for discretionary review) that he made a sufficient showing in support of his request for reduction of the bond. Respondent respectfully submits that such failure in his burden of proof raises a non-constitutional issue of importance to no one other than to the present petitioner.

In addition, the petitioner has failed to completely advise this Court precisely what he was required to do in proceedings below concerning the appeal bond. For example, he fails to allege in this Court, just as he failed to allege in the Kansas appellate courts below, that he pursued any alternatives to the posting of the entire amount of the bond. He alleges no attempt by him to raise the necessary bond, or some part thereof, through a private surety which might provide the appeal bond for a percentage on the dollar, and there is no factual record on this point. Further, it is not a bond in the amount of 125% of the tax *and penalty* which must be produced, rather, it is 125% of the *tax*. K.S.A. 74-2426(d); Kan. Sup. Ct. R. 9.03(b). The $1,144,460.00 figure quoted by petitioner in his Petition is tax *and a 100% penalty*. Finally, as the petitioner's Statement of the Case reflects, this case has been litigated since 1988, the petitioner at no time showing any signs of giving up. Petitioner alleges no reason for his failure over the last eight (8) years to prepare for the need to post an appeal bond.

Petitioner addresses none of these considerations in his Petition. As such, the limited scope of the issue presented in

this case will likely not impact any other litigant, and is not grounds for certiorari.

V. THE ORDERS BY THE KANSAS COURT OF APPEALS AND SUPREME COURT DO NOT CONFLICT WITH DECISIONS OF THIS COURT, WITH DECISIONS OF OTHER STATE COURTS, OR WITH DECISIONS OF UNITED STATES COURTS OF APPEAL

A. IN THE AREAS OF TAXATION, STATES MAY REQUIRE PAYMENT FIRST, AND PROVIDE PROCESS SECOND

Petitioner fails to acknowledge that the area of taxation, as here, is of special concern; states may require tax payments first, then provide process to adjudicate liability and lawfulness. In *McKesson v. Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990), for example, this Court considered the action by a taxpayer seeking a declaration that a Florida taxing scheme was unconstitutional and a refund of taxes paid thereunder. The Florida Supreme Court granted the first, but denied the second, request. Although this Court held that Florida must provide the taxpayer some form of backward-looking relief, it noted:

> [I]t is well established that a State need not provide pre-deprivation process for the exaction of taxes. Allowing taxpayers to litigate their tax liabilities prior to payment might threaten a government's financial security, both by creating unpredictable interim revenue shortfalls against which the State cannot easily prepare, and by making the ultimate collection of validly imposed taxes more difficult. To protect government's exceedingly strong interest in financial stability in this context, we

> have long held that a State may employ various financial sanctions and summary remedies, such as distress sales, in order to encourage taxpayers to make timely payments prior to resolution of any dispute over the validity of the tax assessment.

496 U.S. at 37. The Court expressed no objection to Florida's scheme "designed so that liquor distributors tender tax payments *before* their objections are entertained and resolved [emphasis original]." *Id.* at 38.

Further, in *California v. Grace Brethren Church*, 457 U.S. 393 (1982), this Court considered whether taxpayers challenging unemployment insurance taxes on constitutional grounds had a plain, speedy, and efficient remedy under state law such as to bar their federal suit pursuant to the anti-injunction act. This Court reiterated that "a state-court remedy is 'plain, speedy and efficient' only if it 'provides the taxpayer with a "full hearing and judicial determination" at which she may raise any and all constitutional objections to the tax'" *Id.* at 411. The Court fully examined California procedures, holding sufficient the taxpayers' right to request a refund of the tax, then if denied, sue in superior court where their constitutional claim could be raised. *Id.* at 413-18. This Court noted that "California taxpayers cannot raise their constitutional challenges in the administrative tax refund proceeding unless an appellate court has already sustained such a challenge." *Id.* at 413, n.30. *See also Nat'l Private Truck Council Inc. v. Okl. Tax Comm'n*, ___ U.S. ___, 132 L. Ed. 2d 509 (1995); *Harper v. Virginia Dept. of Taxation*, ___U.S. ___, 125 L. Ed. 2d 74, 84 (1995).

Kansas' appeal bond operates no more than to require payment of the tax (plus 25% presumably to cover any penalty and accruing interest), or such lesser amount as the Court

requires, prior to providing the taxpayer access to final appellate remedies. The bond is expressly designed to ensure the taxpayer's "prosecution of the review without delay and payment of all costs assessed against the petitioner." K.S.A. 74-2426(d). Consistently with the logic of the cases cited, such scheme is constitutional. Petitioner makes no claim that his appeal bond would not have been promptly returned to him *in full* had he been successful in his appeal.

B. EQUAL PROTECTION

Petitioner's Equal Protection claim is devoid of any legal analysis. He fails to advise the Court of what class he is a member which has been discriminated against, and he fails to advise the Court of the appropriate level of scrutiny for any such class. Further, the petitioner fails to acknowledge that persons *similarly situated* under Kansas law, *i.e.*, taxpayers appealing Board of Tax Appeals' decisions, are presumptively treated in precisely the same fashion: the appeal bond is required in all cases unless by the Court waived or lowered. K.S.A. 74-2426(d), (e); Kan. Sup. Ct. R. 9.03(b). There is much legislative wisdom in this requirement.

Taxpayers failing to pay their rightful due are an exceptional category for, without the payment of taxes (income, sales, severance, drug, or whatever) the ship of State sinks. In the past, this Court has recognized the importance of government's collection of revenues. *E.g.*, *McKesson*, above; *Commissioner v. Shapiro*, 424 U.S. 614, 631 n.12 (1976). Petitioner makes no claim to the contrary in his Petition.

Further, Kansas law requires an appeal bond for non-tax litigants to stay enforcement of judgments in such amount "as the [district] court requires." K.S.A. 60-2103(d). As such, there has been no singling out of the present petitioner for special treatment. *See generally Christopher LaSalle and Co.*

v. Heller Financial, 731 F. Supp. 279, 287-88 (N.D. Ill. 1990) (holding state supercedeas bond provision making no distinction among litigants not violative of Equal Protection Clause). Petitioner makes no claim to the contrary in his Petition.

In addition, because the petitioner might have pursued other avenues to gain review of his Double Jeopardy issue, any alleged roadblock to review created by the appeal bond is simply not an unconstitutional one. In *Kadrmas v. Dickinson Pub. Schools*, 487 U.S. 450 (1988), involving an Equal Protection challenge against North Dakota's charging a user school bus fee in certain districts but not elsewhere, this Court considered the availability to the plaintiffs of alternative methods of transportation. This Court distinguished the precedents cited by the plaintiffs, explaining that:

> [E]ach [case cited by the plaintiffs] involved a rule that barred indigent litigants from using the judicial process in circumstances where they had no alternative to that process. Decisions invalidating such rules are inapposite here. In contrast to the 'utter exclusiveness of court access and court remedy,' [citation omitted], North Dakota does not maintain a legal or a practical monopoly on the means of transporting children to school. Thus, unlike the complaining parties in all the cases cited by appellants, the Kadrmas family could and did find a private alternative to the public school bus service for which Dickinson charged a fee.

487 U.S. at 460-61. As such, and for other reasons as well, this Court determined that there was no Equal Protection violation. *See also U.S. v. Kras*, 409 U.S. 434, 445-46 (1973) (bankruptcy filing fee upheld against an Equal Protection challenge by indigent; court determined debtor had other means available for same relief); *Bodie v. Connecticut*, 401

U.S. 371 (1971)(filing fee for divorce action held violative of Due Process in challenge by indigents; court determined no other means to terminate marital relation existed).

Although Kansas' appeal bond requirement obviously exists in administrative *tax* appeals under Kansas law, the same bond requirement does not exist in other types of proceedings in which the petitioner might have sought to challenge the constitutionality of Kansas' drug tax. For example, in *State v. Gulledge*, 257 Kan. 915, 896 P.2d 378 (1995), the Kansas Supreme Court considered and decided the constitutionality of Kansas' drug tax in a criminal case. There is no bond requirement in Kansas criminal cases.

Further, this Court considered a challenge to the constitutionality as applied of Montana's drug tax statute in a bankruptcy appeal. *Montana Dept. of Rev. v. Kurth Ranch*, 511 U.S. ___, 128 L. Ed. 2d 767, 114 S. Ct. 1937 (1994).[2] The undersigned understands that one of the petitioners in the initial Petition for Certiorari filed a bankruptcy case the filing of which case punctuates the point made here. The undersigned is unaware of any bond requirement in bankruptcy cases. The filing fee for a bankruptcy case, is of course, valid. *Kras*, above, 409 U.S. 434.

In addition, petitioner could have attempted to invoke equitable remedies under Kansas law. *E.g.*, K.S.A. 60-801 *et seq.*, mandamus; K.S.A. 60-901 *et seq.*, injunction; or K.S.A. 60-1701 *et seq.*, declaratory judgment. Only the injunction statutes have a bond requirement but such is limited to damages and attorney's fees incurred because of wrongful injunction and may be waived. K.S.A. 60-905(b). Although the

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[2] As noted above, the petitioner does not raise the Double Jeopardy issue in his Petition.

precise extent to which a taxpayer may resort to such remedies has not fully been determined in Kansas, relief may be available in some circumstances. *E.g., Barker v. State,* 249 Kan. 186, 815 P.2d 46 (1991), *rev'd,* 503 U.S. 594 (1992) (court entertained class action challenging constitutionality of Kansas' income tax act). *See also First Page, Inc. v. Cunningham,* 252 Kan. 593, 595, 847 P.2d 1238 (1993); *Dean v. State,* 250 Kan. 417, 427, 826 P.2d 1372 (1992); *Zarda v. State,* 250 Kan. 364, 371, 374, 826 P.2d 1365, *cert. denied,* 112 S. Ct. 2941 (1992).

The petitioner should have the burden of proving that these alternative remedies are unavailable or inadequate. *E.g., Pennzoil Co. v. Texaco, Inc.,* 481 U.S. 1, 14-16 (1987)(abstention doctrine considered; petitioner for federal relief held to have burden of proving that State procedures to adjudicate its constitutional claims were inadequate). Although some such proceedings would very likely now be time-barred under Kansas law due to the statute of limitations, or otherwise, the fact that such proceedings existed at the time that the petitioner thought that he had a Double Jeopardy challenge vitiates any claim by him that he has not had the freedom of access to a court with the power to address such claim. The petitioner makes no claim that he was led to believe that he was required to proceed *solely* pursuant to the administrative process. The petitioner has failed to analyze this consideration in his Petition for Certiorari.

One of the cases distinguished by this Court in *Kadrmas,* above, was *Lindsey v. Normet,* 405 U.S. 56 (1972), holding violative of the Equal Protection Clause an Oregon law requiring tenants in landlord/tenant disputes to post a double appeal bond to appeal forcible entry and detainer decisions. In addition to the availability of alternative remedies in the case at bar, however, additional reasons distinguish the stat-

utes in issue in *Lindsey* from Kansas' appeal bond statute. Initially, Oregon tenants seeking to appeal such decisions were required to post not only the double bond required in such actions, but also the undertaking required of general appellants. *Id.* at 74-76. Further, the double bond requirement was "unrelated to actual rent accrued or to specific damage sustained by the landlord." *Id.* at 77. This Court concluded that, "in the case before us, however, the State has not sought to protect a damage award or property an appellee is rightfully entitled to because of a lower court judgment. Instead, it has automatically doubled the stakes when a tenant seeks to appeal an adverse judgment in an FED action." *Id.* at 78-79. An appellant from a Board of Tax Appeals' decision is not, however, subject in Kansas to any multiple bond requirement, nor is the appeal bond unrelated to the amount of tax, penalty, and interest in issue. *See also Bankers Life & Casualty Co. v. Crenshaw,* 486 U.S. 71 (1988)(upholding against Equal Protection challenge Mississippi's 15% penalty on unsuccessful appellants).

The petitioner's Equal Protection argument fails.

C. DUE PROCESS

Petitioner's Due Process claim is similarly devoid of analysis of any kind. Petitioner states at most that "no judicial authority can review the [drug tax] statute until such time as they have posted a bond in the amount of 125% of the tax." Petition for Certiorari at 5. As noted above, however, due process concerns are different in the tax arena given the importance of the state's interests involved; payment first, then process, is permissible.

Further, the petitioner's opportunity to fully address the constitutional issue in the Kansas appellate courts below in moving to waive or lower the appeal bond fully satisfies the

Due Process Clause. *Christopher LaSalle,* above, 731 F.Supp. at 288-89. The district court there noted:

> It must be concluded as a matter of law that Christopher was afforded all the process that it was due. After all, both in theory and in fact, Christopher had the full opportunity to marshal all its arguments—constitutional and otherwise—against conditioning its right to a stay on the posting of such a large bond. It simply failed to convince the reviewing court that its position merited relief. Surely there is no reason to believe that the Illinois Appellate Court shirked its responsibility to safeguard the constitutional rights of any litigant in considering that motion—and if Christopher believed otherwise, it had the right to seek review of *that* decision [emphasis original; footnotes omitted].

Id. at 289.

Lindsey, above, also supports respondent's position in this case. There, this Court reiterated that "Due process requires that there be an opportunity to present every available defense." *Lindsey,* 405 U.S. at 66. Although Oregon law barred assertion by the tenant in an FED action of all his potential defenses, *id.* at 65-66, this Court held sufficient the tenant's right to raise such issues in other actions, *id.* at 66-69. Respondent has sketched out, above, the other proceedings potentially available to petitioner for assertion of his constitutional claim.

The petitioner's Due Process argument also fails.

CONCLUSION

Respondent respectfully requests the Court deny the Petition for Certiorari.

Respectfully submitted,

Richard E. Oxandale,
General Counsel
Kansas Department of Revenue

Joseph Brian Cox, Attorney
Kansas Department of Revenue
Legal Services Bureau
Docking State Office Building
Topeka, Kansas 66612-1588
(913) 296-2381
Counsel of Record for Respondent
Kansas Department of Revenue